APPENDIX A

STATE DEPARTMENT INSTRUCTIONS OF JULY 10, 1981 TO DIPLOMATIC AND CONSULAR POSTS REGARDING TREATY TRADER VISAS

SUBJECT: E VISAS

REF: STATE 089624

1. THE DEPT. RECENTLY SENT TO ALL JAPANESE POSTS FURTHER GUIDELINES FOR ADJUDICATING E-1 VISA APPLICATIONS, IN ORDER TO FILL IN SOME OF THE INSTRUCTIONAL GAPS IN THE FAM NOTES AND TO FOSTER UNIFORMITY OF REGULATORY INTERPRETATION. IT NOW APPEARS THAT IT WILL BE SOME TIME BEFORE FAM REVISIONS BASED ON THAT CABLE ARE COMPLETED, SO THE TEXT IS PROVIDED BELOW FOR ALL POSTS' INFO AND GUIDANCE IN THE INTERIM.

2. THE FOLLOWING IS THE TEXT OF STATE 089624: QUOTE

1. AS PROMISED IN REFTEL B, THE FOLLOWING IS A WRAP-UP OF THE DEPARTMENT'S PRECEDENTIAL GUIDELINES OVER THE YEARS FOR ADJUDICATING ENTITLEMENT TO E-1 TREATY TRADER VISAS. CONTRARY TO THE SUSPICION GENERATED BY THE WIDESPREAD ATTENTION GIVEN TO THE CLAIMED "JAPANESE E VISA PROBLEM", THERE IS NOTHING NEW OF IMPORTANCE IN THESE GENERAL GUIDELINES. RATHER, THEY ARE BASED ON PRECEDENTIAL MATERIALS GOING BACK AS FAR AS THE 1950'S,

AND POSTS WILL FIND THAT MUCH OF THE LANGUAGE HEREIN REPETITIVE OF ADVISORY OPINIONS RECEIVED IN THE PAST.

2. WITHIN THE SUBSTANTIVE E-1 VISA CONTEXT, THREE KEY ISSUES SEEM TO SURFACE WITH SOME FREQUENCY: A) THE NATURE OF AN "EXECUTIVE/SUPERVISORY" POSITION; B) THE "SPECIFIC QUALIFICATIONS" THAT MAKE A GIVEN APPLICANT'S SKILLS "ESSENTIAL" TO A FOREIGN FIRM'S US OPERATIONS; AND C) WHAT ACTIVITIES CONSTITUTE "SUBSTANTIAL TRADE" WITHIN THE MEANING OF SECTION 101 (A) (15) (E) OF THE INA. A SEPARATE, LESSER, ISSUE IS THE SUITABILITY IN VARYING CIRCUMSTANCES OF SUBSTITUTING THE "L" INTRA-COMPANY TRANSFEREE VISA CLASSIFICATION FOR THE E-1 CLASSIFICATION.

3. EXECUTIVE/SUPERVISORY POSITION. THERE ARE NO "BRIGHT LINE" TESTS FOR EASILY DETERMINING WHETHER A GIVEN APPLICANT IS DESTINED TO AN EXECUTIVE OR SUPERVISORY POSITION AND THEREFORE ENTITLED TO AN E-1 VISA. MUCH DEPENDS ON THE CONSULAR OFFICER'S JUDGEMENT OF THE PECULIAR FACTUAL CIRCUMSTANCES OF EACH INDIVIDUAL CASE. INDEED THE DEPARTMENT HAS CONSISTENTLY ARGUED THAT DETAILED

GUIDELINES ARE NOT DESIRABLE, SINCE THIS WOULD SUBSTANTIALLY HEIGHTEN THE DANGER OF CASTING THE ADMINISTRATION OF TREATY TRADER VISAS INTO AN OVERLY RIGID MOLD AND THEREBY INHIBIT THE INHERENT FLEXIBILITY OF THE E VISA NEEDED TO COVER THE MYRIAD TRADE SITUATIONS IN THE COMPLEX MODERN-DAY INTERNATIONAL ECONOMIC ARENA.

4. IN ASSESSING AN EXECUTIVE/SUPERVISORY QUESTION RAISED BY AN INDIVIDUAL CASE, FACTORS WHICH MAY BE WEIGHED INCLUDE, AMONG OTHERS, THE TITLE OF THE POSITION TO WHICH AN APPLICANT IS DESTINED, THE LOCATION OF THE JOB IN THE FIRM'S ORGANIZATIONAL STRUCTURE, THE DUTIES INVOLVED, THE DEGREE TO WHICH THE APPLICANT WILL HAVE ULTIMATE CONTROL AND RESPONSIBILITY FOR THE FIRM'S OVERALL OPERATIONS OR A MAJOR COMPONENT THEREOF, THE NUMBER AND SKILL LEVELS OF THE EMPLOYEES WITHIN HIS RESPONSIBILITY, AND WHETHER HE PRESENTLY POSSESSES EXECUTIVE OR SUPERVISORY EXPERIENCE WHICH WOULD REASONABLY QUALIFY HIM FOR THE PROPOSED ASSIGNMENT. A FEDERAL DISTRICT COURT RULING IN "SANSEI V. ESPERDY, 298 F. SUPP. 945 (1969)", INDICATES THAT LEVEL OF PAY IS ANOTHER FACTOR THAT MAY PROPERLY BE CONSIDERED. THE CONSULAR OFFICER MAY REQUEST SUCH DOCUMENTATION AS HE FEELS NECESSARY TO SATISFY HIMSELF THAT THE POSITION IS INDEED EXECUTIVE OR SUPERVISORY IN CHARACTER, AND SHOULD SEEK TO ELICIT FURTHER INFO IF NECESSARY DURING THE VISA INTERVIEW.

5. ONCE ALL THE NECESSARY FACTS AND EVIDENCE ARE BEFORE THE CONSULAR OFFI-

CER IN A SPECIFIC CASE, THE TEST TO BE APPLIED IS ESSENTIALLY ONE OF WHETHER THE EXECUTIVE/SUPERVISORY COMPONENT OF THE DESCRIBED POSITION IS AN "INCIDENTAL/COLLATERAL" FUNCTION OF THE JOB OR A "PRINCIPAL/PRIMARY" FUNCTION ESSENTIALLY INHERENT IN THE JOB'S VERY NATURE. IF THE POSITION PRINCIPALLY REQUIRES MANAGEMENT SKILLS, OR ENTAILS SUPERVISION OVER AND KEY RESPONSIBILITY FOR A LARGE PORTION OF A FIRM'S OPERATION, AND ONLY INCIDENTALLY INVOLVES SUBSTANTIVE, DAY-TO-DAY STAFF WORK RELATED TO THE FIRM'S TYPE OF BUSINESS, E-1 WOULD BE APPROPRIATE IN MOST CIRCUMSTANCES. CONVERSELY, IF THE POSITION CHIEFLY INVOLVES ROUTINE WORK THAT IS THE SUBJECT MATTER OF THE BUSINESS AND ONLY SECONDARILY ENTAILS SUPERVISION OF SEVERAL LOW-LEVEL EMPLOYEES, THEN THE POSITION IN ALL PROBABILITY COULD NOT BE TERMED "EXECUTIVE OR SUPERVISORY" IN CHARACTER.

6. POSTS SHOULD ALSO BE AWARE THAT THE WEIGHT TO BE ACCORDED A GIVEN FACTOR MAY VARY DEPENDING ON THE CIRCUMSTANCES OF THE PARTICULAR CASE. AS A

SIMPLE EXAMPLE, A POSITION DESCRIPTION GIVING THE NOMINAL TITLE OF "VICE PRESIDENT" TO THE SECOND MAN IN A SMALL TWO-MAN BANKING OFFICE WOULD BE OF LITTLE UTILITY IN A CLAIM THAT THE POSITION WAS A SUPERVISORY ONE. THE SAME TITLE, WHILE NOT DETERMINATIVE IN ITSELF, WOULD CARRY GREATER WEIGHT IN THE CASE OF AN APPLICANT COMING TO A MAJOR BANKING OPERATION HAVING NUMEROUS EMPLOYEES. INDEED, IN THE LATTER CASE, AN APPLICANT COMING TO HEAD ONE OF THAT OPERATION'S BUREAUS OR DEPARTMENTS (E.G. ACCOUNTING, LOANS, ETC) COULD PROBABLY BE DEEMED DESTINED TO AN EXECUTIVE OR SUPERVISORY POSITION AND THEREFORE ENTITLED TO E-1 ISSUANCE.

7. ALSO ILLUSTRATIVE IS THE BIA'S DECISION IN "MATTER OF UDAWAGA", 14 I AND N DEC. 578 (1974) THAT A RESTAURANT CHEF WHO WOULD TRAIN AND SUPERVISE OTHER COOKS IN A SMALL RESTAURANT WAS NOT ENTITLED TO TREATY INVESTOR STATUS. ITS RATIONALE WAS THAT CONGRESS DID NOT INTEND FOR "MINOR MANAGERIAL POSITIONS" TO BE FILLED BY ALIEN WORKERS WHEN THE POSITION COULD BE HELD BY AN AMERICAN EMPLOYEE "WITHOUT PLACING IN JEOPARDY THE U.S. INVESTMENT MADE BY A FOREIGN FIRM". MANAGERIAL STANDARDS FOR BOTH E-1 AND E-2 VISAS ARE FUNDAMENTALLY THE SAME.

8. "ESSENTIAL" SKILLS. HERE AGAIN, THERE ARE NO CLEAR "TESTS" FOR EASILY JUDGING

WHETHER AN ALIEN POSSESSES "SPECIFIC QUALIFICATIONS" THAT ARE "ESSENTIAL" TO A TREATY TRADER FIRM'S US OPERATIONS. THE NATURE OF THE DETERMINATION IS SUCH THAT EACH CASE MUST BE EXAMINED INDIVIDUALLY ON ITS OWN FACTS AND MERITS. GENERALLY, TWO THOUGHTS SHOULD BE BORNE IN MIND. FIRST, E-1 STATUS IS INTENDED ONLY FOR THE ENTRY OF SPECIALIST EMPLOYEES TRULY ESSENTIAL TO THE FIRM'S OPERATIONS IN THE U.S., AND NOT AS A CHANNEL FOR THE IMPORTATION OF ORDINARY SKILLED WORKERS NO MATTER HOW DESIRABLE THIS MIGHT BE FROM THE FIRM'S VIEWPOINT. SECONDLY, A COMMON THEME IN SUCH CASES IS THE QUESTION, "WHAT IS IT THAT THE FOREIGN WORKER CAN DO UNDER THE CIRCUMSTANCES THAT AN AMERICAN WORKER CANNOT DO OR CANNOT BE TRAINED TO DO?

9. THE BURDEN OF PROOF IN "ESSENTIAL SKILLS" CASES IS ON THE COMPANY AND THE APPLICANT. THE CONSULAR OFFICER IS NOT BOUND BY THE EMPLOYEE'S ASSERTIONS OR TERMINOLOGY IN DESCRIBING THE POSITION, BUT MAKES HIS OWN DETERMINATION OF THE ALIEN'S QUALIFICATIONS. SUCH FACTORS AS THE ALIEN'S DEGREE OF PROVEN EXPERTISE IN HIS AREA OF SPECIALIZATION, THE UNIQUENESS OF HIS SPECIFIC SKILLS, LENGTH OF

EXPERIENCE AND TRAINING WITH THE INTERESTED FIRM, THE PERIOD OF TRAINING REASONABLY NECESSARY TO PERFORM THE CONTEMPLATED DUTIES, THE KIND OF SALARY THE TECHNICIAN'S SPECIAL EXPERTISE CAN COMMAND, ETC., ARE GIVEN CONSIDERATION. 22 CFR 41.40 NOTE 10 PROVIDES ALSO THAT HIGHLY TRAINED TECHNICIANS MAY BE ISSUED E-1 VISAS FOR CERTAIN FUNCTIONS; THE EMPHASIS IS ON "HIGHLY" TRAINED AND THE PRESUMPTION IS THAT U.S. WORKERS WILL BE TRAINED IN DUE COURSE TO REPLACE THE FOREIGN TECHNICIANS, THUS OBVIATING THE NEED FOR CONTINUAL REPLACEMENT OF THESE TECHNICIANS WITH MORE FOREIGN TECHNICIANS AFTER A REASONABLE PERIOD OF TIME.

10. IN ASSESSING WHETHER COMPETENT U.S. WORKERS ARE AVAILABLE TO PERFORM THE SKILLS NEEDED BY THE TREATY TRADER FIRM, THE CONSULAR OFFICER SHOULD RELY IN LARGE PART ON HIS OWN KNOWLEDGE OF CONDITIONS IN THE AMERICAN LABOR MARKET. IN MOST INSTANCES, THE FACTS OF A PARTICULAR APPLICANT'S CASE WILL SUGGEST THE PROPER DECISION TO BE MADE. FOR EXAMPLE, A TV REPAIRMAN WOULD NOT GENERALLY QUALIFY, WHILE A TV TECHNICIAN COMING TO TRAIN US WORKERS IN NEW TECHNOLOGY INCORPORATED IN A TV PRODUCT NOT YET GENERALLY AVAILABLE IN THE U.S. MARKET PROBABLY WOULD QUALIFY UNDER NOTE 10. IN RARE CASES WHERE THE ESSENTIAL SKILLS

QUESTION CANNOT BE RESOLVED ON THE FACTS OF THE CASE AND ADDITIONAL INFO SOLICITED FROM THE FIRM, THE FIRM MIGHT BE ASKED TO PROVIDE STATEMENTS REGARDING THE UNAVAILABILITY OF US WORKERS FROM SUCH KNOWLEDGEABLE SOURCES AS CHAMBERS OF COMMERCE, LABOR ORGANIZATIONS, INDUSTRY TRADE SOURCES OR STATE EMPLOYMENT SERVICES. AS A FOOTNOTE, POSTS ARE REMINDED THAT KNOWLEDGE OF THE JAPANESE LANGUAGE AND CULTURE HAS BEEN SPECIFICALLY FOUND BY THE BIA NOT TO BE A SPECIFIC QUALIFICATION ESSENTIAL TO A FIRM'S U.S. OPERATIONS WITHIN THE MEANING OF THE REGULATION. SEE "MATTER OF KONISHI", 11 I. AND N. DEC. 815 (1966).

11. TRADE. QUESTIONS OF WHETHER A PARTICULAR JAPANESE FIRM QUALIFIES AS A TREATY TRADER FIRM ON THE BASIS OF "SUBSTANTIAL TRADE" WITH THE US SEEM TO OCCUR RELATIVELY INFREQUENTLY. 22 CFR 41.40 AND NOTES THERETO PROVIDE A GOOD BASIS FOR DETERMINING WHETHER THE REQUISITE TRADE RELATIONSHIP EXISTS.

12. 22 CFR 41.40 NOTE 5 PROVIDES SOME GENERAL GUIDELINES CONCERNING WHAT ACTIVI-

TIES OF A COMMERCIAL NATURE CONSTITUTE "TRADE". BEYOND THESE, THE TERM "TRADE" IS RELATIVELY VAGUE AND AMENABLE TO VARYING INTERPRETATIONS. LEGISLATIVE HISTORY AND PRECEDENT DECISIONS, INCLUDING BY FEDERAL COURTS, ARE NOT ENLIGHTENING ON THE SUBJECT. THE AVAILABLE BACKGROUND INFO SUGGESTS THAT THE CONCEPT OF "TRADE" WAS TO BE VIEWED IN A BROAD AND LIBERAL MANNER, SO AS TO PROVIDE THE FLEXIBILITY TO ENCOMPASS THE WIDE-RANGING TYPES OF TRANSACTIONS IN THE BUSINESS WORLD.

13. AS INDICATED BY 22 CFR 41.40 NOTE 5.2, THE FOCUS OF THE INQUIRY SHOULD BE ON THE EXISTENCE OF A "TRANSACTION", OR EXCHANGE OF GOODS AND MONIES IN THE FLOW OF INTERNATIONAL COMMERCE WHICH SUPPOSEDLY BENEFIT BOTH PARTIES TO THAT TRANSACTION. THE SIMPLEST EXAMPLE IS THE FLOW OF MANUFACTURED GOODS FROM A PARTICULAR JAPANESE COMPANY TO THE U.S. IN EXCHANGE FOR US MONIES. SIMILARLY, IN INSURANCE TRANSACTIONS, THE PROTECTION AFFORDED BY FOREIGN INSURANCE—THE POLICY—FLOWS TO THE BENEFIT OF THE U.S. HOLDER OF THAT INSURANCE IN EXCHANGE FOR US PAYMENT FOR THAT POLICY. JAPANESE TOURIST MONIES FLOW TO THE U.S. IN EXCHANGE FOR TRANSPORTATION TICKETS, HOTEL ACCOMMODATIONS, ETC. IN THE BANKING CONTEXT, THE COMMODITY BEING

EXCHANGED CONSISTS OF MONEY, SECURITIES, AND OTHER FORMS OF FINANCIAL "PAPER".

14. THE MOST PROBLEMATIC CONCERN IN THE JAPANESE CONTEXT SEEMS TO BE THE REQUIREMENT OF A DIRECT TRADE LINK BETWEEN THE US AND JAPAN, WHICH IMPACTS ON JAPANESE MANUFACTURERS WHO DEAL EXCLUSIVELY OR LARGELY THROUGH THE JAPANESE TRADING COMPANIES. HERE, THESE SITUATIONS CAN PERHAPS BE BEST ANALYZED BY POSTS BY FOCUSING ON THE SPECIFIC "TRANSACTION" OR EXCHANGE IN QUESTION AND THE PARTIES THERETO. THUS, IF JAPANESE MANUFACTURER "A" SELLS ITS GOODS TO JAPANESE TRADING COMPANY "B", WHO IN TURN SELLS THOSE GOODS IN THE US TO US COMPANY "C", THERE ARE TWO "TRANSACTIONS", ONE BETWEEN A AND B AND ANOTHER BETWEEN B AND C. BECAUSE THE FORMER TRANSACTION IS WHOLLY DOMESTIC TO JAPAN, COMPANY A COULD NOT QUALIFY AS A TREATY TRADER, WHILE COMPANY B IS ENTITLED TO THAT STATUS ON THE BASIS OF THE LATTER TRANSACTION.

15. POSTS SHOULD TAKE CARE, HOWEVER, TO DISTINGUISH BETWEEN THE ABOVE SCENARIO AND THE SEPARATE SITUATION WHERE THE MANUFACTURER MERELY CONSIGNS HIS GOODS IN SOME FASHION TO THE TRADING COMPANY WHICH HANDLES AND FACILITATES THE ONWARD SHIPMENT OF THE GOODS TO THE US. THE KEY IN MOST OF THESE CASES IS

WHETHER AN ACTUAL SALE OF THE GOODS HAS OCCURRED BETWEEN A AND B, THUS CUTTING OFF A'S OWNERSHIP OR TITLE TO THE GOODS. IF A HAS LOST OWNERSHIP TO THE GOODS BY SALE TO B, THEN A CANNOT BENEFIT FOR TREATY TRADER PURPOSES FROM THE INCIDENTAL FACT THAT THE GOODS ULTIMATELY REACH U.S. MARKETS; THE DIRECT TRADE LINK TO THE U.S. IS BROKEN. ON THE OTHER HAND, IF A RETAINS AN OWNERSHIP INTEREST IN THE GOODS, IT CAN BE VIEWED AS TRADING WITH THE US DIRECTLY IRRESPECTIVE OF THE FACT THAT AN INTERMEDIATE COMPANY HANDLES THEIR SHIPMENT.

16. FOR POSTS' INFO. THE INTRICATE NATURE OF MODERN INTERNATIONAL BUSINESS DEALINGS HAVE GIVEN RISE TO SEVERAL VISA-RELATED QUESTIONS FROM POSTS IN VARIOUS PARTS OF THE WORLD CONCERNING THE REFINEMENT OF THE DEFINITION OF "TRADE". THEREFORE, VO HAS UNDERTAKEN AN INFORMAL, LONG-TERM REVIEW OF THAT DEFINITION WITH A POSSIBLE VIEW TOWARD REVISING AND EXPANDING THE FAM NOTES TO ENCOMPASS SOME OF THESE QUESTIONS. ANY INPUT POSTS WISH TO MAKE CONCERNING THE WORKINGS AND PROBLEMS OF JAPANESE-U.S. TRADE, AND PARTICULARLY THE PECULIAR RELATIONSHIP BETWEEN JAPANESE MANUFACTURERS AND THE LARGE "TRADING COMPANIES" WOULD BE WELCOME.

17. "E" VS "L": POSTS SHOULD BE CAREFUL TO DISTINGUISH BETWEEN THE "E" AND "L" CLASSIFICATIONS, AND THE SITUATIONS WHERE EACH IS APPROPRIATE. THE INTRA-COMPANY TRANSFEREE CATEGORY WAS DESIGNED TO SUPPLEMENT, NOT SUPPLANT, THE TREATY TRADER VISA IN INSTANCES WHERE THE LATTER IS UNAVAILABLE, SUCH AS WHERE NO TREATY EXISTS, THE FIRM IS AMERICAN, THE FIRM LACKS THE REQUISITE "SUBSTANTIAL TRADE", OR WHERE THE APPLICANT IS A THIRD-COUNTRY NATIONAL EMPLOYEE OF A TREATY TRADER FIRM. THE "L" VISA WAS NOT INTENDED FOR USE IN CASES WHERE THE INTENDED POSITION OR THE APPLICANT HIMSELF LACKS THE REQUISITE QUALIFICATIONS FOR AN "E" VISA, THAT IS, WHERE THE POSITION IS NOT EXECUTIVE/SUPERVISORY IN NATURE OR HE DOES NOT HAVE "ESSENTIAL" SKILLS. AS WITH "E" VISAS, SECTION 101 (A) (15) (L) REQUIRES THAT THE POSITION BE MANAGERIAL OR EXECUTIVE, OR THAT THE APPLICANT HAVE SPECIALIZED KNOWLEDGE IN ORDER FOR HIM TO BE ENTITLED TO "L" STATUS.

18. POLICY GUIDANCE. THERE IS LITTLE THAT CAN OR NEED BE ADDED TO PREVIOUS

GUIDANCE PROVIDED IN REFTELS AND OTHER DEPARTMENT CABLES. REACTION OVER THE JAPANESE E VISA "ISSUE" SEEMS TO HAVE ESSENTIALLY RUN ITS COURSE IN ANY CASE, ALTHOUGH SPORADIC INQUIRIES ARE STILL MADE. IT MAY BE HELPFUL TO POSTS TO KEEP IN MIND THAT JAPANESE BUSINESS SENSITIVITY OVER E VISA QUESTIONS AND THE PERCEIVED LINKAGE TO TRADE ISSUES IS NOT A NEW PHENOMENON, BUT RATHER A RECURRING THEME OVER THE YEARS. ILLUSTRATIVE OF THIS IS OSAKA KOBE'S A-16 OF JUNE 21, 1972, WHICH MENTIONS THE POLICY IMPLICATIONS JAPANESE BUSINESSMEN FELT AT THAT TIME WERE LINKED TO E VISA PROBLEMS, AND MATERIALS IN VO'S PRECEDENT FILES WHICH SUGGEST THAT JAPANESE WORRIES OVER THE BROADER BILATERAL TRADE RELATIONSHIP WERE IN THE BACKGROUND OF OTHER E VISA CASES OVER THE YEARS.

19. DEPARTMENT ENCOURAGES POSTS TO CONTINUE EFFORTS, SUCH AS THOSE MENTIONED IN OSAKA KOBE'S CABLE 1177 OF 11/14/80, TO HOLD DISCUSSIONS WITH JAPANESE BUSINESSMEN AND COMPANIES, AND OTHERWISE KEEP THEM INFORMED OF E VISA REQUIREMENTS. SUCH INFORMATIONAL EXCHANGES CAN HELP ALLEVIATE MANY OF THE JAPANESE CONCERNS OVER E VISA MATTERS, ELIMINATE CONFUSION OVER THE CRITERIA FOR SUCH VISAS AND DOCUMENTARY EVIDENCE NEEDED TO SUPPORT APPLICATIONS, AND GENERALLY FOSTER AN ATMOSPHERE OF BETTER UNDERSTANDING AND COOPERATION BETWEEN JAPANESE BUSINESSMEN AND CONSULAR OFFICIALS. UNQUOTE HAIG

APPENDIX B

TEXT OF CABLE FROM THE UNITED STATES EMBASSY IN TOKYO TO THE SECRETARY OF STATE, RECEIVED FEBRUARY 26, 1982

FM AMEMBASSY TOKYO

TO SECSTATE WASHDC IMMEDIATE 8496

UNCLAS TOKYO 03300

E.O.12065: N/A
TAGS: EEWT, PGOV, JA
SUBJECT: AVIGLIANO V. SUMITOMO IN SUPREME COURT

REFS: (A) STATE 026490; (B) STATE 049474; (C) TOKYO 02843

1. MFA SECOND NORTH AMERICA DIVISION DEPUTY CHIEF YAMADA CALLED IN EMBOFF ON AFTERNOON FEBRUARY 26 TO DELIVER FOLLOWING OFFICIAL MFA POSITION REGARDING THE AVIGLIANO-SUMITOMO CASE:

"A. THE MINISTRY OF FOREIGN AFFAIRS, AS THE OFFICE OF GOJ RESPONSIBLE FOR INTERPRETATION OF THE FCN TREATY, REITERATES ITS VIEW CONCERNING THE APPLICATION OF ARTICLE 8 PARAGRAPH 1 OF THE TREATY: FOR THE PURPOSE OF THE TREATY, COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND, THEREFORE, A SUBSIDIARY OF A JAPANESE COMPANY WHICH IS INCORPORATED UNDER THE LAWS OF NEW YORK IS NOT COVERED BY ARTICLE 8 PARAGRAPH 1 WHEN IT OPERATES IN THE UNITED STATES.

"B. THE MINISTRY OF FOREIGN AFFAIRS NOTES THAT THE ENCOURAGEMENT OF MUTUALLY BENEFICIAL INVESTMENTS BETWEEN THE TWO COUNTRIES IS AN IMPORTANT OBJECT AND PURPOSE OF THE FCN TREATY AND, IN THIS REGARD, HOPES THAT THE SUMITOMO CASE WILL BE SETTLED IN SUCH A MANNER AS NOT TO DISCOURAGE SOUND ACTIVITIES OF SUBSIDIARIES OF JAPANESE COMPANIES IN THE UNITED STATES."

2. YAMADA NOTED THAT THE FOREGOING WAS "NOT AN AGREED PAPER," OR JOINT STATEMENT BY MFA AND MITI; HOWEVER, MFA'S POSITION HAD BEEN MADE KNOWN IN SUBSTANCE TO MITI, WHICH HAD POSED NO OBJECTION.

CLARK

APPENDIX C

Post World War II Treaties of Friendship, Commerce, and Navigation Between the United States and other Nations that Contain an Employment Privilege Similar to (but Sometimes with Arguably Substantial Differences from) that in Article VIII(1) of the Japanese Treaty

BELGIUM.

Treaty of Friendship, Establishment and Navigation (Article 8(1)(2)), Feb. 12, 1961, (Treaty of 1875 in force prior to this date) 14 U.S.T. 1284, T.I.A.S. 5432.

[1] DENMARK.

Treaty of Friendship, Commerce, and Navigation (Article VII(4)), Oct. 1, 1951, (Convention of 1826 was in force prior to this date) 12 U.S.T. 908, T.I.A.S. 4797.

ETHIOPIA.

Treaty of Amity and Economic Relations. (Article VIII(5)), Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. 2864.

FRANCE.

Convention of Establishment, Protocol, and Declaration (Article VI(1)(2), Protocol (9)), Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. 4625.

[2] GERMANY.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. 3593.

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[1] DENMARK. The Convention of 1826 does not apply to the Faroe Islands or Greenland.

[2] GERMANY. The Treaty which entered into force in 1956 now applies to Berlin, as defined in Article XXVI thereof.

GREECE.

Treaty of Friendship, Commerce and Navigation (Article XII(4)), Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. 3057.

IRAN.

Treaty of Amity, Economic Relations and Consular Rights (Article IV(4)), Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853.

IRELAND.

Treaty of Friendship, Commerce and Navigation (Article VI(1)), Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. 2155.

ISRAEL.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. 2948.

ITALY.

Treaty of Friendship, Commerce, and Navigation (Article I(2), III(3), Supp., Art. II), Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. 1965.

[3] JAPAN.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. 2863.

KOREA.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. 3947.

LUXEMBOURG.

Treaty of Friendship, Establishment and Navigation (Article VIII(1)(2), Prot. (7)), Feb. 23, 1962, 14 U.S.T. 251, T.I.A.S. 5306.

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[3] JAPAN. The Treaty which entered into force in 1953 does not apply to trade with the Ryukyu Islands (south of 29 degrees north latitude), or to certain lesser island groups specified in Protocol paragraph 13 thereof.

MUSCAT AND OMAN (THE SULTANATE OF).

Treaty of Amity, Economic Relations and Consular Rights (Article V(3)), Dec. 20, 1958, 11 U.S.T. 1835, T.I.A.S. 4530.

NETHERLANDS.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1), Prot. (11)), Mar. 27, 1956, 8 U.S.T. 2043, T.I.A.S. 3942.

NICARAGUA.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. 4024.

PAKISTAN.

Treaty of Friendship, Commerce, and Protocol (Article VIII(1)), Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. 4683.

TAIWAN.

Treaty of Friendship, Commerce and Navigation, with Protocol (Article II(2)), Nov. 4, 1946, 63 Stat. 1299.

THAILAND.

Treaty of Amity and Economic Relations (Article IV(6)), May 29, 1966, 19 U.S.T. 5843, T.I.A.S. 6540.

TOGO.

Treaty of Amity and Economic Relations (Article V(3)(4)), Feb. 5, 1967, 18 U.S.T. 1, T.I.A.S. 6193.

VIETNAM.

Treaty of Amity and Economic Relations (Article V(2)(3)), Nov. 30, 1961, 12 U.S.T. 1703, T.I.A.S. 4890.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 369931 834